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No. 06-736

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The National Environmental Development Association's Clean Air Project ("NEDA/CAP") was an intervenor in support of the United States Environmental Protection Agency ("EPA") in the D.C. Circuit below, and is a respondent in this case. EPA's petition lists all the parties to the proceeding. *See* Pet. ii-iii. NEDA/CAP is a non-profit association of manufacturers that has no parent corporations and has issued no stock.

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Pursuant to S. Ct. Rule 12.6, respondent National Environmental Development Association's Clean Air Project ("NEDA/CAP") respectfully submits this response in support of the petition for certiorari filed by the Environmental Protection Agency ("EPA") seeking review of the judgment of the United States Court of Appeals for the D.C. Circuit below. The D.C. Circuit invalidated an important regulatory initiative under the Clean Air Act ("CAA")—EPA's Equipment Replacement Provision ("ERP") rule—that sought to

bring much needed certainty and consistency to a complex administrative scheme. The court's decision adversely affects thousands of regulated entitles nationwide, and has deleterious consequences for regulators and the environment as well. The Solicitor General has deemed this matter important enough to merit this Court's review. The petition should be granted.

1. NEDA/CAP intervened in support of EPA in the D.C. Circuit below. NEDA/CAP's members are manufacturers representing major industrial sectors, including the aerospace, aluminum, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products industries. NEDA/CAP's members own and operate "major emitting facilities" and "major stationary sources" under the CAA, and thus are subject to the Act's New Source Review ("NSR") permitting requirements when they undertake an activity at their plants that constitutes a "modification"—defined in the Act as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4).

Manufacturers typically use multiple process lines—consisting of dozens or even hundreds of pieces of equipment—to make various products during different periods of the year depending on economic demand and other factors. Over the life of a piece of a equipment, manufacturers undertake numerous routine maintenance, repair, and replacement activities to ensure the safety, reliability, and efficiency of the equipment. Such activities typically do not alter the equipment's original design or production capacity, but merely allow the equipment to function as it had before it began to deteriorate. In other words, such activities do not physically "change" a piece of equipment in any fundamental

way, but merely "maintain[] the [equipment] as designed." Pet. App. 46a.

2. EPA has long recognized that "Congress specifically decided that existing sources generally would not be required to obtain [NSR] permits," *id.* at 117a, and that therefore "Congress did not intend that every activity at an existing facility be considered a physical or operational change for purposes of NSR." *Id.* at 131a (quotation omitted). Thus, since the inception of the NSR program, EPA has excluded from the definition of "physical change" activities that constitute "routine maintenance, repair, and replacement" ("RMRR"). *See id.* at 119a-121a. Prior to the ERP rule, EPA had never sought to specify what types of activities constituted RMRR. Instead, EPA applied the RMRR exclusion on "a case-by-case basis," using an indeterminate "multi-factor test" that involved "weighing the nature, extent, purpose, frequency, and cost of the work as well as other factors." *Id.* at 4a, 31a (quotation omitted). In one applicability determination, EPA considered 14 different factors in determining whether a proposed activity constituted RMRR. *See* Detroit Edison Applicability Determination Detailed Analysis 10-11 (May 23, 2000); 65 Fed. Reg. 77623 (Dec. 12, 2000).

Over time, EPA came to acknowledge that the RMRR exclusion has been difficult to apply and that it has produced undesirable results. As EPA has explained, the application of the exclusion on a "case-by-case basis" has made it "difficult for the owner or operator to know with reasonable certainty whether a particular activity constitutes RMRR." Pet. App. 32a. That uncertainty has led sources "to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions." *Id.* at 34a. It has also posed problems for regulators, who must "devote scarce resources to make complex [RMRR] determinations. *Id.*

To remedy these and other problems, EPA adopted the ERP rule—a bright line rule that automatically excludes certain RMRR activities from the definition of "physical change." Under the ERP rule, an activity falls within the RMRR exclusion if it (1) involves replacement of any existing components of a unit with components that are identical or serve the same purpose as the replaced components; (2) the fixed capital cost of the replaced component, plus costs of any activities that are part of the replacement activity, does not exceed 20 percent of the current replacement value of the unit; and (3) the replacement does not alter the basic design parameters of the unit or cause the unit to exceed any legally enforceable emissions or operational limitation that applies to any component of the unit. *Id.* at 41a.

EPA explained that the ERP rule would provide certainty to regulated entities, ease administrative burdens by freeing regulators from the task of "time-consuming RMRR determinations," and remove disincentives to RMRR activities, "thereby enhancing key operational elements such as efficiency, safety, reliability, and environmental performance." *Id.* at 36a. EPA further noted that, "[i]n many cases, we believe that maintaining safe, reliable, and efficient operations will have the corresponding environmental benefit of reducing the amount of pollution generated per product produced." *Id.* at 44a. Thus, EPA emphasized, the ERP rule "[is] consistent with the central purpose of the CAA"—" 'to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.' " *Id.* (quoting 42 U.S.C. § 7401(b)(1).

4. The D.C. Circuit invalidated that important regulatory initiative. Although the court acknowledged that the term "physical change" is "susceptible to multiple meanings," *id.* at 17a, the court nevertheless concluded that Congress's use of the term "any" before "physical change" mandated that the

term "physical change" be given its most "expansive meaning." *Id.* at 12a. The court thus held that "physical change" encompasses all "activities within each of the common meanings of the [term] * * * when the activity results in an emission increase." *Id.* at 17a. EPA, therefore, was not free to "pick and choose among them." *Id.* at 12a. The court also held that the ERP rule was invalid because it "would allow equipment replacements resulting in non-*de minimis* emissions increases." *Id.* at 17a.

5. This Court's review of the D.C. Circuit's decision is warranted. The question presented is important and affects thousands of regulated entities across the country in all major industrial sectors. The ERP rule provides regulated entities with certainty that certain types of repair and replacement activities—those involving the repair or replacement of components with identical or functionally equivalent components that do not alter the basic design parameters of a unit and that do not exceed 20 percent of the current replacement value of the unit—fall within the RMRR exclusion. That certainty will encourage entities to undertake critical repair and replacement activities that promote the safety, reliability, and efficiency of their equipment, and that may have the "corresponding environmental benefit" of reducing emissions from a source. *Id.* at 44a.

As EPA noted, the uncertainty attending the existing RMRR exclusion has led sources "to forego needed and beneficial maintenance, repair, and replacement activities, including ones that would likely have reduced emissions," *id.* at 34a, rather than run the risk of triggering NSR review. That is not only because NSR review is burdensome and expensive, but also because it is extremely time-consuming and results in significant delays. As EPA recently reported, the entire NSR permitting process can take between 7 and 22 months. *See* EPA, *New Source Review: Report to the President* 20 (2002). If NSR review is triggered, a source may not undertake the proposed activity until a permit has

been issued. *See* 40 C.F.R. § 51.166(a)(7)(iii). Dozens if not hundreds of repair and replacement activities that merely "maintain[] the [equipment] as designed," Pet. App. 46a, could occur on a single process line over the course of a year. If all such activities were subject to NSR review, manufacturing in this country would virtually grind to a halt. *See id.* at 33a (noting that NSR delays present "a potentially significant barrier to today's global, quick-to-market industries, such as computer chips, pharmaceuticals, and autos").

The D.C. Circuit's invalidation of the ERP rule has adverse consequences for regulated entities, federal and state regulators, and the environment. Moreover, as the Solicitor General explains (Pet. 23), the court's ruling may limit EPA's ability to remedy the problems associated with the existing RMRR exclusion and may even cast doubt on that exclusion itself—even though EPA has "historically construed" the exclusion to "encompass[] activities that are within the broadest meaning of 'physical change' " *id.* at 23, and has "never construed" the exclusion "to encompass only de minimis emissions increases," *id.* at 17-18—as well as several other exclusions that have been in existence for nearly thirty years. *See id.* at 10, 24. There is accordingly no basis for the Court to wait until another day to resolve this important issue. The Court should thus grant review and ensure that NSR review is limited to "new" sources, just as Congress intended.

CONCLUSION

For the foregoing reasons, and those in EPA's petition for certiorari, the petition should be granted and the D.C. Circuit's judgment reversed.

Respectfully submitted,

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